No. 08-1512

Supreme Court, U.S.
FILED
JUL 28 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CYNTHIA GATES, *et al.*,

Petitioners,

v.

SPEEDWAY SUPERAMERICA, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY

BRIEF IN OPPOSITION

MARSHAL M. PITCHFORD
Counsel of Record
STEPHEN W. FUNK
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, OH 44308
(330) 376-2700

Counsel for Respondent

223976

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Seventh Amendment to the United States Constitution precludes an award of summary judgment against a claimant seeking a jury trial?

RULE 29.6 STATEMENT

Speedway SuperAmerica LLC is a Delaware limited liability company and qualified to do business in the state of Ohio. Speedway SuperAmerica LLC is a wholly owned subsidiary of Marathon Petroleum Company LLC which is a Delaware limited liability company.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Introduction	1
Statement of the Case & Facts	2
Reasons for Denying the Petition	4
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Helton v. Scioto Cty. Bd. Of Commrs.,
123 Ohio App.3d 158, 703 N.E.2d 841
(Ohio App. 4 Dist. 1997) 2

Houk v. Ross,
34 Ohio St.2d 77, 296 N.E.2d 266
(Ohio 1973) 7

Marra v. Philadelphia Housing Authority,
497 F.3d 286 (3rd Cir. 2007) 5, 6, 7

Mergenthal v. Star Banc Corp.,
122 Ohio App.3d 100, 701 N.E.2d 383
(Ohio App. 12 Dist. 1997) 2

Provateare v. Hausman Co.,
Cuyahoga App. No. 74061, unreported,
1999 WL 258194
(Ohio App. 8 Dist. April 29, 1999) 8

Sawchyn v. Buckeye Union Inc. Co.,
Cuyahoga App. No. 50510, unreported,
1992 WL 104293
(Ohio App. 8 Dist. May 14, 1992) 7

Schneider v. Associated Estates Realty,
Cuyahoga App. No. 73981, unreported,
1999 WL 126942
(Ohio App. 8 Dist. Mar. 4, 1999) 8

Cited Authorities

	Page
Sheetz v. Kentwood, Inc., 152 Ohio App.3d 20, 22, 786 N.E.2d 501, 2003-Ohio-1209 (Ohio App. 11 Dist. 2003)	8
Univ. Carnegie Med. Partners v. Cleveland Therapy Ctr., Inc., Cuyahoga App. No. 61016 61463, unreported, 1992 WL 292270 (Ohio App. 8 Dist. Oct. 15, 1992)	7
United States Constitution:	
Seventh Amendment	i, 5
Rule:	
U.S. Sup. Ct. R. 10	1, 4

INTRODUCTION

Petitioners Cynthia and James Gates ("Petitioners") have presented no "compelling reasons" for why their Petition for Writ of Certiorari ("Petition") should be granted. This case simply involves a state court of last resort's proper application of Ohio common law. There is no federal question involved. Petitioners improperly frame the issue as a Seventh Amendment case, when in actuality this is a simple trip and fall claim, that should be, and has been, decided pursuant to Ohio state law.

Although Sup. Ct. R. 10 is not an exhaustive list of the types of cases over which the Supreme Court will exercise jurisdiction, none described in the rule apply here. This is not a case in which two federal court of appeal decisions differ. This is not a case where a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a federal court of appeal. This is not a case where a state court has decided an important question of federal law that should be settled by this Court or that conflicts with a prior ruling of this Court.

Respondent Speedway SuperAmerica, L.L.C. respectfully submits that this Court should not accept this case.

STATEMENT OF THE CASE AND FACTS

A. Summary of Proceedings

After both parties were afforded the opportunity to thoroughly brief the issues, the trial court granted Speedway SuperAmerica L.L.C.'s ("Speedway") Motion for Summary Judgment on September 18, 2007. Petitioners appealed that decision to the Eighth District Court of Appeals. In an opinion dated October 14, 2008, the Eighth District Court of Appeals extensively reviewed the record and affirmed the award of summary judgment in favor of Speedway. Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.*, 123 Ohio App.3d 158, 162, 703 N.E.2d 841, 843 (Ohio App. 4 Dist. 1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 701 N.E.2d 383 (Ohio App. 12 Dist. 1997). Thus, two courts independently reviewed this case in its entirety and reached the same conclusion.

Petitioners then appealed that decision to the Supreme Court of Ohio. On March 4, 2009, the Supreme Court of Ohio declined to exercise its jurisdiction.

B. Statement of Facts

This case arises out of an alleged trip-and-fall incident that occurred outside a service station on the evening of November 19, 2004. It was about 6:45 p.m. and dark, a fact of which Petitioner Cynthia Gates was

well aware. As she had done on a weekly basis for the seven (7) previous years, Petitioner Gates came to the Speedway service station to purchase gas. She had visited this same Speedway station over a hundred times before without any incident. She described herself as a "regular." She was admittedly "familiar" with the premises in both daytime and nighttime conditions and at all times of the year. The night in question was no different. According to her deposition testimony, she found the outdoor service station, the raised center island with the soft-drink coolers and display racks, and the driveway pavement all as she had every other night. Things were "as usual."

After pumping her gas, Mrs. Gates walked over to the soft-drink cooler on the raised island, stepped up onto the platform, and retrieved two bottles of iced tea. She turned and walked down the sidewalk/island approximately five steps toward the cashier's pay station. When she encountered a familiar display at the end of the island, she retreated approximately two steps, pivoted left, and, with her right foot, stepped down off the ledge.

As she stepped off the curb, the right side of her right foot came in contact with a four-foot-long, half-inch-wide crack. At this point, using Petitioner Gates' words, the height-differential between the two ledges was "miniscule." She then brought her left foot down from the raised island to the driveway/parking lot

surface, lost her balance, "teetered" for a few seconds, and fell. Petitioner Gates conceded that there was nothing distracting her attention at the time of her fall. Nothing obstructed her view of the crack.

Petitioners then brought suit and claimed that Speedway was negligent in lighting the outdoor service station and that the curb and crack constituted an actionable defect/danger. Speedway moved for summary judgment on the common law grounds of the "open and obvious" defense and/or Ohio's "two inch" rule. The trial court determined that Petitioners' claims failed as a matter of law, and the appellate court agreed.[1] The ruling was based entirely on state law and did not raise any federal question.

REASONS FOR DENYING THE PETITION

I. PETITIONERS HAVE NOT ADVANCED ANY COMPELLING REASONS AS TO WHY THEIR WRIT SHOULD BE GRANTED

Supreme Court of the United States Rule 10 states that a petition for a writ of certiorari will only be granted for "compelling reasons." Petitioners in this matter have failed to advance any compelling reason as to why their petition should be granted. As noted above, this case does *not* involve a situation where conflicting decisions between two federal courts of appeal exists, on the same issue. Furthermore, this case does *not* involve a state court of last resort deciding an important federal

[1] Petitioner Cynthia Gates claimed personal injuries while her husband, James Gates, advanced a loss of consortium count. Because the loss of consortium count was derivative, summary judgment on it was proper too.

question that conflicts with another state court of last resort or a federal court of appeal, or an important federal question that should be decided by this court.

Rather, this case involves a straightforward, state law trip and fall claim, in which summary judgment was properly granted in favor of the Respondent. Petitioners couch the issue in this case in a manner to lead this Court to believe that this is a Seventh Amendment claim, but that is simply not true. Indeed, Petitioners chief complaint is that summary judgment was improper. (Petitioners' Writ at 7). The Seventh Amendment does not prohibit a properly entered award of summary judgment. No court has ever held that. This case presents state law claims that were considered by three courts. Thus, the Court should deny the Petition too.

II. A GRANT OF SUMMARY JUDGMENT UNDER STATE LAW DOES NOT INFRINGE UPON THE RIGHT TO TRIAL BY JURY

Petitioners assert that this claim involves a "substantial constitutional question", and posit this Court to decide whether the Seventh Amendment to the United States Constitution prohibits an award of summary judgment against them. In support of their theory, Petitioners cite to *Marra v. Philadelphia Housing Authority*, 497 F.3d 286 (3rd Cir. 2007), seemingly for the proposition that they must be afforded a jury trial in this case. This is incorrect.

The original *Marra* action was brought in a federal district court. The claim went to trial before it reached the Third Circuit Court of Appeals. At trial, the district court permitted the Plaintiff's statutory claims to be heard by a jury, even though Pennsylvania law said that a claimant bringing a claim under that particular statute was not entitled to one. The district court concluded that it was not bound by Pennsylvania state law, and that the right to a jury trial in federal court is a matter of federal law.

The *Marra* Court noted:

> "The right to a jury trial in federal court, regardless of whether the claim arises under state law, presents a question of federal law," *In re City of Philadelphia Litigation*, 158 F.3d 723, 726 (3d Cir.1998) (citing *Simler v. Conner*, 372 U.S. 221, 222, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963) (per curiam); *Cooper Labs., Inc. v. Int'l Surplus Lines Ins. Co.*, 802 F.2d 667, 671 (3d Cir.1986)), "even when a state statute or state constitution would preclude a jury trial in state court." *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 230 (8th Cir.1996) (citations omitted). This long-recognized precept is dictated by the clear command of the Seventh Amendment. *See* U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."); *Simler*, 372 U.S. at 222, 83 S.Ct. 609 ("The federal policy favoring jury trials is of historic and continuing strength. Only through a

> holding that the jurytrial [sic] right [in federal court] is to be determined according to federal law can the uniformity in its exercise[,] which is demanded by the Seventh Amendment[,] be achieved.") (internal citations and footnote omitted).

The *Marra* Court concluded:

> In any event, long-standing Supreme Court precedent requires the application of federal law in determining the right to a jury trial in *federal court*, *Simler*, 372 U.S. at 222, 83 S.Ct. 609, and our decision in Bereda cannot, and should not, be understood to suggest anything to the contrary.

Marra is easily distinguishable from the case at bar, as this suit was brought in state court, not federal court. *Marra* dealt with the right to a jury trial in federal court, which is a matter of federal law, and in no way permeates the state law issues presented here.

Regardless, Petitioners' right to a jury trial was not infringed upon when a proper order of summary judgment was entered against them. In fact, the Supreme Court of Ohio, and countless other Ohio courts, have held as much. See *Houk v. Ross*, 34 Ohio St.2d 77, 83-84, 296 N.E.2d 266, 271 (Ohio 1973); see, also, *Univ. Carnegie Med. Partners v. Cleveland Therapy Ctr., Inc.*, Cuyahoga App. No. 61016 61463, unreported, 1992 WL 292270 (Ohio App. 8 Dist. Oct. 15, 1992); *Sawchyn v. Buckeye Union Inc. Co.*, Cuyahoga App. No. 50510, unreported, 1992 WL 104293 (Ohio App. 8 Dist. May 14, 1992).

Here, both the trial court and appellate court had an opportunity to review the Petitioners' state law claims, and the Supreme Court of Ohio declined to review the case. Both courts found that no issue of material fact existed to be litigated and that Speedway was entitled to summary judgment as a matter of state law. This determination does not violate the Petitioners' right to a jury trial. They were simply subject to Ohio common law defenses as a matter of law.

III. THE LOWER COURTS PROPERLY APPLIED OHIO STATE LAW IN DETERMINING THAT NO GENUINE ISSUES OF MATERIAL FACT REMAIN TO BE LITIGATED IN THIS MATTER, ENTITLING RESPONDENT TO JUDGMENT AS A MATTER OF LAW

Respondent Speedway moved for and was awarded summary judgment because Petitioners asserted that the company had a duty to provide a minimum level of outdoor lighting. Ohio law has no such requirement. *Sheetz v. Kentwood, Inc.*, 152 Ohio App.3d 20, 22, 786 N.E.2d 501, 503, 2003-Ohio-1209, at ¶9 (Ohio App. 11 Dist. 2003); see also, *Provateare v. Hausman Co.*, Cuyahoga App. No. 74061, unreported, 1999 WL 258194 at *2 (Ohio App. 8 Dist. April 29, 1999); *Schneider v. Associated Estates Realty*, Cuyahoga App. No. 73981, unreported, 1999 WL 126942 (Ohio App. 8 Dist. Mar. 4, 1999). Speedway also proved that the crack upon which Petitioner Gates tripped was less than two inches high and was open and obvious, barring liability.

In an attempt to get past summary judgment, Petitioners advanced the affidavit of Petitioner Cynthia Gates. The trial court found that this affidavit did not

generate an issue of material fact. The appellate court reached the same conclusion, and even noted that the affidavit improperly contradicted Cynthia Gates' prior testimony. The Supreme Court of Ohio declined to review the case. This case involves a state law trip and fall claim, that was properly decided within the confines of Ohio law. No "compelling" reason exists warranting review by this Honorable Court.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant their Petition. The Supreme Court of Ohio declined to review this matter, and this Honorable Court should as well. This case does not involve an important question of federal law. It is a simple trip and fall case, in which Ohio courts properly applied Ohio common law. Respondent Speedway Super America, L.L.C. respectfully requests that this Court deny the Petition.

Respectfully submitted,

STEPHEN W. FUNK
Counsel of Record
MARSHAL M. PITCHFORD
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, OH 44308
(330) 376-2700

Counsel for Respondent